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PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte GERALD HEWES, ESWAR PRITADARSHAN,
BOON HWANG, and SRINIVASARAO NANDIWADA

Appeal 2009-006763
Application 10/521,507
Technology Center 2400

Before: JAY P. LUCAS, CAROLYN D. THOMAS, and
DEBRA K. STEPHENS, *Administrative Patent Judges*.

STEPHENS, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

Appellants appeal under 35 U.S.C. § 134(a) (2002) from a final rejection of claims 1-34, 40-42, and 45-51. Claims 35-39, 43, and 44 have been canceled (App. Br. 4).² We have jurisdiction under 35 U.S.C. § 6(b) (2008).

We AFFIRM-IN-PART.

Introduction

According to Appellants, the invention is a system and method for executing communication programs and direct marketing techniques using data messaging communication devices (Spec. 1).

STATEMENT OF CASE

Exemplary Claim(s)

Claim 1 is an exemplary claim and is reproduced below:

1. A system for organizations to develop, test, execute and analyze messaging programs defining a message application server comprising:

(a) a dialog designer configured to provide a user interface to an organization's program designer and marketer, to allow for rapid messaging program creation, to provide the ability to select a type of messaging program, to select a service address for the messaging program, to schedule the messaging

² Although Appellants indicate that the Examiner's rejection of claims 50 and 51 are appealed (App. Br. 4 and 22)—claims that are also reproduced in the Appeal Brief's Claims Appendix—these claims depend from cancelled claims 36 and 38, respectively. *See* App. Br. 51 (Claims App'x). Since claims 50 and 51 inappropriately depend from cancelled claims, we are unable to ascertain the precise scope of each of these claims. As a result, the Examiner's rejection as to claims 50 and 51 is unclear. Therefore, the rejection of claims 50 and 51 will not be addressed in this decision.

program for execution, to upload messaging user data into lists, to create segments, to download messaging program result data, to test the messaging program, to provide reports, including real-time reports, on the messaging program;

(b) a dialog server configured to execute the messaging program by execution of a messaging instructions, to manage substantially simultaneously executed messaging programs, to store messaging user results and message delivery status, to maintain state and session context across message invocations for messaging users within a messaging program; and

(c) a message exchange configured to route messages to and from messaging service providers, to manage service addresses, to perform message billing and to connect-to messaging service providers;

whereby organizations can execute messaging programs interacting with messaging users via the messaging service providers.

Prior Art

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

| | | |
|------------|--------------------|---------------|
| Eggleston | US 5,958,006 | Sep. 28, 1999 |
| Gilchrist | US 6,205,471 B1 | Mar. 20, 2001 |
| Caswell | US 6,336,138 B1 | Jan. 1, 2002 |
| Dattatri | US 2002/0049815 A1 | Apr. 25, 2002 |
| Tucciarone | US 2004/0122730 A1 | Jun. 24, 2004 |

REJECTIONS

Claims 1-8, 12, 14, 15, and 17 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Caswell. (Ans. 3-6).

Claims 18 and 19 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Gilchrist. (Ans. 6-7).

Claims 9, 10, and 13 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Caswell and Eggleston. (Ans. 7-8).

Claims 11, 16, 27-31, 40, 41, and 46-49 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Caswell, and Gilchrist. (Ans. 8-13).

Claims 32-34, 42, and 45 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Caswell, Gilchrist, and Eggleston. (Ans. 13-16).

Claim 20 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Gilchrist. (Ans. 16).

Claim 21 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Gilchrist and Tucciarone. (Ans. 16-17).

Claims 22-25 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gilchrist and Dattatri. (Ans. 17-19).

Claim 26 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Gilchrist and Eggleston. (Ans. 19-20).

ISSUE 1

35 U.S.C. § 102(b): claims 1-8, 12, 14, 15, and 17

Appellants argue their invention is not anticipated by Caswell because Caswell does not disclose a system to develop, test, and execute messaging programs and to analyze the developed results of the messaging program, as recited in claim 1 (App. Br. 13-16 and Reply 2 and 3). More specifically, Appellants contend Caswell merely describes a process that models generic

network services and creates a generic map of type of network service to model the health of network elements (*id.*).

In response, the Examiner maintains that Caswell meets the claim 1 limitation of “a dialog designer configured . . . to allow for rapid messaging program creation” as Caswell discloses generating a service model that provides an interface to a designer for configuration (Ans. 20).

Additionally, the Examiner finds Caswell discloses the limitation of “to schedule the messaging program for execution” since Caswell describes a configuration where agent are scheduled for execution (*id.*). The Examiner further finds Caswell discloses the limitation of “to test the messaging programs, to provide reports . . . on the messaging programs” since Caswell discloses an operational monitoring function (*id.*). The Examiner then finds that Caswell’s disclosure of an e-mail system discloses a “messaging program” (Ans. 20 and 21).

Issue 1: Has the Examiner erred in finding that Caswell discloses “a dialog designer configured to provide a user interface...to allow for rapid messaging program creation, to provide the ability to select a type of messaging program...to schedule the messaging program for execution...to test the messaging program, to provide reports...on the messaging program” as recited in claim 1?

FINDINGS OF FACT (FF)

Caswell

(1) Caswell describes a method and system of modeling a selected service within a network environment. A service model template, not

specific to the network environment is formed. (Abstract).

(2) To construct a service model, first, a specification of a service model template 34. “The service model template is a generic specification of the service topology and measurement topology for the service of interest (e.g., Read Mail service).” The template defines nodes of various types such as hosts, servers, links, and services; their associated measurements; and dependencies among the nodes; (e.g., the Read Mail service which refers to a subscriber accessing his/her mailbox depends on the authentication and NFS services). (Col. 5, ll. 45-57).

(3) The measurements instruction specifies a list of measurements that are targeted at a corresponding node for a service mode instance. The measurement specifications of nodes in the service model instance are processed. The measurement agent configurator determines agents that must be scheduled for execution against each element of the discovered instance. (Col. 15, ll. 55-63).

ANALYSIS

We agree with the Appellants’ contentions that the Examiner has not shown Caswell discloses the disputed limitations (App. Br. 13-16 and Reply 3 and 4). The Examiner points to various portions of Caswell to support the contention that Caswell discloses the recited dialog designer (Ans. 3, 4, 20, and 21). However, the Examiner does not fully explain how the template-driven process used to provide a service model for an e-mail system (FF 2) – which the Examiner asserts is the messaging system – relates to agents scheduled for execution (FF 3) which the Examiner asserts schedules the messaging program for execution (Ans. 21).

Similarly, the Examiner does not fully explain how generating a template for Read Mail service topology and measurement topology allows for rapid messaging program (Read Mail service) creation (Ans. 20). If the Examiner's burden is met, the burden then shifts to the Appellants to overcome the *prima facie* case with argument and/or evidence.

The *prima facie* case is a procedural tool of patent examination, allocating the burdens of going forward as between examiner and applicant (*In re Spada*, 911 F.2d 705, 707 n. 3, 15 (Fed.Cir.1990)). The term "*prima facie* case" refers only to the initial examination step (*In re Piasecki*, 745 F.2d 1468, 1472 (Fed.Cir.1984); *In re Rinehart*, 531 F.2d 1048, 1052 (CCPA 1976)). As discussed in *In re Piasecki*, the examiner bears the initial burden, on review of the prior art or on any other ground, of presenting a *prima facie* case of unpatentability. If that burden is met, the burden of coming forward with evidence or argument shifts to the applicant.

We conclude that the rejection of claim 1 lacks the requisite specificity needed for the establishment of a *prima facie* case of anticipation. As the examiner bears the initial burden of presenting a *prima facie* case of unpatentability (*In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992)), and that burden has not been met in a manner enabling proper review.

Therefore, we conclude the Examiner has not shown Caswell anticipates the invention as recited in claim 1. Since dependent claims 2-8, 12, 14, 15, and 17 depend from independent claim 1, the Examiner has not shown claims 2- 8, 12, 14, 15, and 17 along with claim 1, are anticipated by Caswell.

ISSUE 2

35 U.S.C. § 103(a): claims 9, 10, and 13 and claims 11 and 16

Claims 9, 10, and 13, rejected under 35 U.S.C. § 103(a) as being unpatentable over Caswell and Eggleston, depend from claim 1. The Examiner has not shown Eggleston cures the deficiencies of Caswell as set forth above in Issue 1 for claim 1. Therefore, claims 9, 10, and 13 stand with claim 1.

Claims 11 and 16, rejected under 35 U.S.C. § 103(a) as being unpatentable over Caswell and Gilchrist, depend from claim 1. The Examiner has not shown Gilchrist cures the deficiencies of Caswell as set forth above in Issue 1 for claim 1. Therefore, claims 11 and 16 stand with claim 1.

ISSUE 3

35 U.S.C. § 102(b): claims 18 and 19

Appellants argue their invention is not anticipated by Gilchrist as Gilchrist does not disclose “an organization’s program designer designing the messaging program” that selects a segment for push programs; selects a program service address; and tests the messaging program (App. Br. 17-20 and Reply Br. 4 and 5). More specifically, Appellants contend Gilchrist describes the mechanism that allows one to design a program at a later time (*id.*).

In response, the Examiner maintains that Gilchrist discloses the disputed limitations (Ans. 21-23). Additionally, the Examiner finds that framework and program are not mutually exclusive and thus, the term framework may include other programming solutions (Ans. 22).

Accordingly, the Examiner interprets framework to mean a program – one that lets a user develop other programs (*id.*). Thus, according to the Examiner, Gilchrist describes designing the messaging program as a user tailoring the framework to provide a mail system (Ans. 21).

Issue 3: Has the Examiner erred in finding that Gilchrist discloses a “an organization’s program designer designing the messaging program” that selects a segment for push programs; selects a program service address; and tests the messaging program as recited in claim 18?

FURTHER FINDINGS OF FACT (FF)

Gilchrist

(4) Gilchrist describes a framework for use with object-oriented programming systems. A common message processing system structure useable on any OOP platform can be configured to support and e-mail message protocol standard or specific mail server function. (Abstract).

(5) Those skilled in the art “appreciate that framework design is necessarily an intertwined and iterative process” (Col. 6, ll. 45-46).

(6) Categories, such as those illustrated in FIG. 12, represent collections of object oriented programming (OOP) objects that encapsulate data attributes and behaviors. Primary class category components, or mechanisms, of the framework are shown. The class category called Message_Center contains messages that the framework will create and process and has a "using" relationship with a class category called Message. Message contains e-mail message information in the form of lists of objects

that store the information that permits the extended framework to process the e-mail messages of Message_Center. (Col. 17, ll. 8-30).

ANALYSIS

We agree with Appellants that the Examiner has not shown Gilchrist discloses the disputed limitations. For example, Gilchrist discloses the Message class category contains e-mail message information in the form of lists of objects that store the information that permits the extended framework to process the e-mail messages of Message_Center (another class category) (FF 6). However, Gilchrist does not disclose that it selects a program service address. Indeed, the cited portion of Gilchrist does not discuss addresses at all and the Examiner has not shown that the “processing of the e-mail messages” includes a function that requires an address.

"A reference anticipates a claim if it discloses the claimed invention 'such that a skilled artisan could take its teachings in combination with his own knowledge of the particular art and be in possession of the invention.'" *In re Graves*, 69 F.3d 1147, 1152 (Fed. Cir. 1995) (quoting *In re LeGrice*, 301 F.2d 929, 936, 133 USPQ 365, 372 (CCPA 1962)). Of course, anticipation "is not an 'ipsissimis verbis' test." *In re Bond*, 910 F.2d 831, 832-33 (Fed. Cir. 1990) (citing *Akzo N.V. v. United States Int'l Trade Comm'n*, 808 F.2d 1471, 1479 & n.11, 1 USPQ2d 1241, 1245 & n.11 (Fed. Cir. 1986)). "An anticipatory reference . . . need not duplicate word for word what is in the claims." *Standard Havens Prods. v. Gencor Indus.*, 953 F.2d 1360, 1369 (Fed. Cir. 1991).

The Examiner also finds Gilchrest's disclosure that framework design is an intertwined and iterative process is “testing the messaging program”

(Ans. 21). The Examiner has not shown that this statement describes testing the messaging program. Indeed, this portion of Gilchrest does not disclose that once the framework (messaging program) is created, it is tested (FF 5). Instead, this discloses that creating the framework which is interaction between objects, is an intertwined and iterative process.

Accordingly, the Examiner has not shown Gilchrist anticipates the invention as recited in claim 19. Therefore, claim 19 also stands with claim 18.

ISSUE 4

35 U.S.C. § 103(a): claim 20, claim 21 and claims 22-25

The Examiner has not shown that Gilchrist renders the invention as recited in claim 20 obvious.

The Examiner has not shown that Tucciarone cures the deficiencies of Gilchrist. Therefore, the Examiner has not shown the combination of Gilchrist and Tucciarone renders the invention as recited in claim 21 obvious.

The Examiner has not shown that Dattatri cures the deficiencies of Gilchrist. Therefore, the Examiner has not shown the combination of Gilchrist and Dattatri renders the invention as recited in claims 22 and 25 obvious.

ISSUE 5

35 U.S.C. § 103(a): claim 26

Appellants assert that their invention is not obvious over Gilchrist and Eggleston because the references do not teach “filtering out the messaging device addresses of users that have opted-out, the filtering out to result in the users that have opted out not receiving the push messages” as recited in

claim 26 (App. Br. 33-35). Specifically, Appellants contend that Eggleston teaches using indices to provide for flexibility in reviewing and requesting data that failed user definable filter settings (App. Br. 34). Thus, unlike the recited invention, Eggleston does not filter out the messaging device addresses of users that have opted-out and such filtering is not inherent in the system of Eggleston (App. Br. 34 and 35 and Reply 8).

The Examiner finds that Eggleston teaches filtering messages based on user selected criteria which results in the messages that are filtered not being sent (Ans. 28). The Examiner further finds Eggleston could be configured so all messages are received or no messages are received (*id.*). Indeed, according to the Examiner, “[t]he system of Eggleston is more advanced than a simple ‘opt-out’ system because Eggleston allows a user to customize a filter which may result in the user receiving no messages, receiving all messages, or receiving some messages” (*id.*). Thus, the Examiner concludes that Applicants’ argument that Eggleston does not disclose “addresses” is not persuasive.

Issue 5: Has the Examiner erred in concluding the combination of Gilchrist and Eggleston teaches “filtering out the messaging device addresses of users that have opted-out, the filtering out to result in the users that have opted out not receiving the push messages” as recited in claim 26”?

FURTHER FINDINGS OF FACT (FF)

Eggleston

(7) Eggleston teaches a method and system for communicating summarized data in a communications system. Select and summary indices give a user flexibility in reviewing and requesting otherwise filtered data.

As new data is filtered for transfer, identifying information is captured for any data that does not meet filter parameters. The user may review the saved identifying information and request data that it desires partial or full transfers for further review. Thus, data that fails filtering parameters may still be transferred at the user's request. (Abstract).

(8) A prestage filter stage applies user-definable filter parameters (e.g., reject, pass, or granularity filters) on data being transferred. The filtering may be used in an e-mail application to filter incoming and outgoing e-mail either locally or at a controller. (Col. 2, l. 66 to col. 3, l. 5).

(9) One approach for mail applications is to have a predetermined number of user-definable filter attributes stored in the client profile databases such as message priority, message sent date, message size, message author, and message subject. The parameters set may be used as reject criteria, pass criteria, or a combination of both. Certain "granularity" filters, i.e., filters additionally limiting the size of a message passing all or most of the other filters, such as, for example, truncation size or text or file attachment filters. A variety of other reject/pass filter criteria may be used by one of ordinary skill in the art. "[C]lients are now provided by the present invention with a means for effecting prestage filtering of their communications by virtue of the communications server and definable filter settings, rather than having to choose between receiving no messages or receive all messages, including less important or expensive and time-consuming transmissions." (Col. 8, ll. 14-55).

(10) Prestage filtering is used in the form of granularity filtering, or automatically retaining the whole data unit or message based upon filterable attributes for later transmission. Each data unit generated is filtered using

the user-selected criteria. Data that meets the criteria is forwarded via the communication server. Data that is not sent, is retained locally for transmission later, e.g., when connected via a lower cost network. The user could additionally choose the type of send (i.e., filtered send or unfiltered send), or be prompted with an alert dialogue or similar message when a message is filtered to decide whether to forward the data unfiltered (steps 438-440.). (Col. 9, ll. 19-43).

ANALYSIS

Eggleston teaches the filtering may be performed at the host (FF 8 and FF 10). Eggleston also teaches messages may be filtered based on a user-selected criteria which may include any of a variety of aspects of a message (FF 9). We conclude a user selecting an e-mail address for filtering messages and setting the filter to prevent receipt of the message would have been an obvious variation well within the skills of one of ordinary skill in the art. As clarified in *KSR*, the skilled artisan is “a person of ordinary creativity, not an automaton.” *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007). Appellants have presented no evidence that modifying the filters of Eggleston to filter based on message device address of the user was “uniquely challenging or difficult for one of ordinary skill in the art” or “represented an unobvious step over the prior art.” *Leapfrog Enters., Inc. v. Fisher-Price, Inc.*, 485 F.3d 1157, 1162 (Fed. Cir. 2007) (citing *KSR*, 550 U.S. at 418). Since this filtering may be performed by the host (FF 8 and FF 10), we find Eggleston teaches or at least suggest filtering out the messaging device addresses of users that have opted-out (set their criteria to filter out the specific address) and as a result, not transmitting the message.

Accordingly, we find Appellants have not shown the Examiner erred in finding that the combination of Gilchrist and Eggleston teaches or suggests “filtering out the messaging device addresses of users that have opted-out, the filtering out to result in the users that have opted out not receiving the push messages” as recited in claim 26.

ISSUE 6

35 U.S.C. § 103(a): claim 27

Appellants assert their invention is not obvious over Caswell and Gilchrist because Gilchrist does not teach “routing the messaging device originated message in the message exchange *to the appropriate messaging service provider*” but instead teaches routing messages to the intended recipient (App. Br. 26 and Reply 6 and 7).

The Examiner states that Appellants do not offer any “reasons or facts” to support the claim that Gilchrist does not disclose the disputed steps of claim 27 and that Gilchrist clearly discloses routing messages to the appropriate service provider by teaching address resolution which results in message routing and storing message status such as a non-delivery status (Ans. 24).

Issue 6: Has the Examiner erred in concluding the combination of Caswell and Gilchrist teaches or suggests “routing the messaging device originated message in the message exchange *to the appropriate messaging service provider*” as recited in claim 27?

ANALYSIS

The Examiner has not set forth the basis for the rejection with sufficient specificity. The Examiner merely indicates that Gilchrist clearly

discloses routing messages to the appropriate service provider in col. 15, l. 17 through col. 16, l. 45 as address resolution. However, we are constrained to find Gilchrist does not teach the limitation despite a broad interpretation of “appropriate service provider.” The Examiner has not identified the element described that is the appropriate messaging service provider, nor has the Examiner indicated that such routing would have been inherent or obvious. As such, the Examiner has not shown Gilchrist teaches “routing the messaging device originated message in the message exchange *to the appropriate messaging service provider*” as recited in claim 27.

ISSUE 7

35 U.S.C. § 103(a): claims 28-31, 40, 41, and 46-49

Appellants assert their invention is not obvious over Caswell and Gilchrist because the combination of the references does not teach or suggest (i) “the client system is configured to interface with the message application server to enable the client system to develop, analyze, test, deploy, and monitor messaging applications, the messaging applications to generate messages, receive messages from and send messages to the message service provider” as recited in claim 28 (App. Br. 27). Specifically, Appellants contend that Gilchrist discloses an email gateway that can accept multiple protocols but does not disclose client systems that develop messaging application (App. Br. 27-28).

The Examiner finds Caswell discloses client systems connected with a message application server and thus discloses client systems that are interfaced with the message application server (Ans. 25). Moreover,

according to the Examiner, Caswell discloses a Read Mail service that is equivalent to a messaging program; Gilchrist discloses the system enables “the client system to develop, analyze, test and deploy as an iterative development process; and combining this technique into the system of Caswell would have been obvious since it would have reduced errors (*id.*).

Issue 7: Has the Examiner erred in concluding the combination of Caswell and Gilchrist teaches a client system configured to interface with a message application server to enable the client system to develop, analyze, test, deploy, and monitor messaging applications, the messaging applications to generate messages, receive messages from and send messages to the message service provider as recited in claim 28?

ANALYSIS

As discussed above with respect to Issue 3, Gilchrist describes that framework design is an intertwined and iterative process (FF 5). The cited portion does not teach or suggest that the client system is configured to develop, analyze, test, deploy, and monitor messaging applications. Instead, Gilchrist merely discloses that creating the framework, which is interaction between cooperating objects, is an intertwined and iterative process. The Examiner does not specify how the cited portion of Gilchrist is equivalent to the claimed analyzing, testing, deploying, or monitoring messaging applications.

Therefore, the Examiner has not shown the combination of Gilchrist and Caswell teaches or suggests the invention as recited in claim 28. Since claims 29-31, 40, 41, and 46-49 depend from independent claim 28, the

Examiner has not shown that claims 29-31, 40, 41, and 46-49, along with claim 28, are rendered obvious by the combination of Gilchrist and Caswell.

ISSUE 8

35 U.S.C. § 103(a): claims 32-34, 42, and 45

ANALYSIS

The Examiner has not shown that Eggleston cures the deficiencies of the combination of Caswell and Gilchrest. Therefore, claims 32-34, 42, and 45 stand with claim 28. Accordingly, the Examiner has not shown Caswell, Gilchrest, and Eggleston render the invention as recited in claims 32-34, 42, and 45 obvious.

DECISION

The Examiner's rejection of claims 1-8, 12, 14, 15, and 17 under 35 U.S.C. § 102(b) as being anticipated by Caswell is reversed.

The Examiner's rejection of claims 18 and 19 under 35 U.S.C. § 102(b) as being anticipated by Gilchrist is reversed.

The Examiner's rejection of claims 9, 10, and 13 under 35 U.S.C. § 103(a) as being obvious over Caswell and Eggleston is reversed.

The Examiner's rejection of claims 11, 16, 27-31, 40, 41, and 46-49 under 35 U.S.C. § 103(a) as being obvious over Caswell and Gilchrist is reversed.

The Examiner's rejection of claims 32-34, 42, and 45 under 35 U.S.C. § 103(a) as being obvious over Caswell, Gilchrist, and Eggleston is reversed.

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The Examiner's rejection of claim 20 under 35 U.S.C. § 103(a) as being obvious over Gilchrist is reversed.

The Examiner's rejection of claim 21 under 35 U.S.C. § 103(a) as being obvious over Gilchrist and Tucciarone is reversed.

The Examiner's rejection of claims 22-25 under 35 U.S.C. § 103(a) as being obvious over Gilchrist and Dattatri is reversed.

The Examiner's rejection of claims 26 under 35 U.S.C. § 103(a) as being obvious over Gilchrist and Eggleston is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2010).

AFFIRMED-IN-PART

Vsh

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